REGD. GOA - 5

Panaji, 7th October, 1991 (Asvina 15, 1913)

SERIES II No. 27

OFFICIAL GAZETTE

GOVERNMENT OF GOA

EXTRAORDINARY

GOVERNMENT OF GOA

Department of Labour

Order

No. 28/30/85-LAB

The following Award given by the Industrial Tribunal, Goa, Daman and Diu is hereby published as required under the provisions of Section 17 of the Industrial Dispute Act, 1947 (Central Act XIV of 1947).

By order and in the name of the Governor of Goa,

Subhash V. Elekar, Under Secretary (Labour).

Panaji, 18th August, 1989.

IN THE INDUSTRIAL TRIBUNAL GOVERNMENT OF GOA AT PANAJI

(Before Shri S. V. Nevagi, Hon'ble Presiding Officer)

Ref. No. IT/27/85

Shri Vithoba Shankar N. Dessai — Workman

V/s

M/s. Sociedade de Fomento Industrial Pvt. Ltd., Margao Goa. — Employer

Workman represented by Shri K. V. Nadkarni.

Employer represented by Shri B. G. Kamat.

Panaji, dated : 11-7-1989

AWARD

This is a reference made by the Government of Goa, by its order No. 28/30/85-ILD dated May 17, 1985 with an annexure scheduled thereto which reads as follows:

"Whether the action of the employer, M/s. Sociedade de Fomento Industrial Private Limited, Margao, Salcete-Goa, in terminating the services of Shri Vithoba Shankar N. Dessai, Driver w.e.f. 26-1-1985 is legal and justified.

If not, to what relief the workman is entitled to?"

The above Government reference pertains to the termination of the services of the Driver, Vithoba Shankar N. Dessai by the employer M/s. Sociedade de Fomento Industrial Pvt. Ltd. The driver was appointed initially at the Mines on 26-8-70. No letter of appointment as such was issued to the workman, driver when he joined the services at the Mines. Subsequently, however, the workman driver was brought to the Head Office of the Party II on or about 8-10-73 and at that time he was issued with a letter of appointment showing that he was appointed as a Driver in the Head Office w.e.f. 8-10-73. From the facts on record the driver was initially appointed on 26-8-70 at the Mine, the appointment being made by oral order and subsequently upon his transfer to the Head Office he was appointed by an order in writing and his services in the Head Office started from 8-10-73.

The management reportedly felt that the workman-driver was not physically fit to drive the vehicles of the company which consisted mainly of the jeeps and cars which were occupied by the officers, employees and at times the bank staff on behalf of the company. During the service period the workman was sent to an eye specialist for examination. The eye specialist examined the workman and issued a certificate of fitness but at the same time recommended glasses to the workman. Hence, since the day of the examination of the driver by the eye specialist the workman started driving the vehicles of the company but by wearing glasses. This is the case made out by the workman stating that all along he was physically fit to drive the vehicles of the company.

However, according to the management the driving of the vehicles of the company by the workman, driver was anything but satisfactory. At times the Bank officers who were travelling in the vehicles driven by the workman used to become scary and were afraid of their safety. Hence the management took a decision to

retrench the workman from service and the management issued the letter of termination dated 26-1-85 and they paid all the legal dues to the driver including notice pay, compensation, gratuity and wages for 59 days of un-availed leave. The management in all paid Rs. 12,633.58 to the workman as retrenchment compensation and the workman collected this amount. According to the management the workman was running in the age of 52 at the time of retrenchment and the age of retirement is 55. The workman was retrenched because the workman was not found suitable for further retention in service.

The workman who was retrenched from service did not take the termination lightly but he raised an industrial dispute by taking the matter to the Labour Commissioner where the conciliation proceedings were held and the talks of conciliation failed and the Labour Commissioner was constrained to make a failure report to the Government.

The Govt. acting on the report came to a conclusion that this industrial dispute regarding the retrenchment of the workman be referred to the Tribunal as contemplated u/s 10(1)(d) of the Act and consequently the Government reference as shown above was made to this Tribunal on 17th May, 1985. The matter was registered and the notices were issued to the parties and the parties appeared in the matter. The workman filed his statement of claim dated 10th July, 1985 reiterating the same points which I have summarised in the foregoing paras. According to him he was physically fit and proper when the order of termination was served on him and according to him the termination is illegal. He claims reinstatement with full back wages with a declaration that he continues to remain in service w.e.f. 26-1-85 and that the order of termination dated 25-1-85 is bad in law. The management filed the written Statement on 28-8-85 justifying its action in retrenching the workman from service and has explained the circumstances how they were compelled to terminate the services of the workman in para 9, 10, 11 and 12 of the Written Statement. According to the management of Party II, what is material is the subjective justification of the management regarding the physical capacity of the workman-driver to drive the vehicles of the company and according to them the action taken by them is fully in compliance with the provisions of Sec. 2(00) read with Sec. 25F of the I.D.A. According to them while taking this action as regards retrenchment they have complied with all legal provisions by paying adequate compensation to the workman and as such according to them there is no industrial dispute which could be raised in the matter and they have justified their action. The workman filed his rejoinder on 23rd Sept., 1985. The company had maintained that the workman joined the services in 1973. He reiterated that he joined the services first in the Mines in 1970. He objected to the statement of the company in paras. 9 to 12 about his physical fitness and he claims that he was in fit physical condition of driving various types of vehicles with the past experience of 15 years and the R.T.O. who is the proper authority had issued him driving icence and renewed the same from time to time.

With these rival contentions my Predecessor considered whether additional issues be framed. By his order dated 6-11-85 he held that no other issues besides those involved in the order of reference were necessary. With this the parties went on trial.

In the meantime an objection was raised on behalf of the workman to the representation of the employer by Shri B. G. Kamat a member of the employer's association. My Predecessor by his speaking order dated 23-9-85 over ruled this objection and permitted Shri Kamat to represent the management. At the same time he allowed the objection in respect of the representation of the employee/Party I, Shri K. V. Nadkarni, Labour Consultant. Shri K. V. Nadkarni, Vice-President of the Union filed his authority letter to which the other party did not have objection. So Shri Nadkarni was allowed to represent the workman and the matter was adjourned for settlement of issues and as already stated above my Predecessor held that no other issue other than the Government reference was necessary.

Hence what is necessary to be considered is whether the order of termination of the services of the driver is just and proper in the circumstances of the case. According to the management of Party II, the action is taken by them by taking an objective view of the matter and the criteria for issuing the order of termination which in fact is the order of retrenchment within the meaning of Sec. 25F of the Act was issued as workman was not found suitable for further retention in service and what was necessary was the subjective satisfaction of the employer of the physical fitness of the workman. Hence according to them this is the case of retrenchment simplicitor and it is not necessary for them to issue a charge sheet before terminating the services of the workman. In support of their case they have relied on the oral testimonies of their retainer in the legal department by name Shriram B. Mapsekar who states that he who is holding the power of attorney had occasions to go to the Mines or to the office with the company car on which the workman V. Dessai was a driver. According to him from June, 1984 onwards he stopped taking the workman as a driver because he found that his driving was very dangerous and it was unsafe to sit in the vehicle which was driven by him. According to him the driver was never able to control the vehicle and the vehicle used to have jerks. He knows all these details because he himself is an experienced person in car driving. He further states that he used to feel scary while sitting in the car that was driven by the workman. In support of their evidence the management has examined V. Raikar one of the Director of the Company and he too states that he was watching the performance of the driver for about two years before terminating his services w.e.f. 26-1-1985. The driver had reached the age of 52 then and the age of retirement was 55. He noticed that the driver while starting the vehicle instead of putting the same in the first gear which is the usual practice used to put it in second gear. Secondly while negotiating curves he was not putting the gears properly. He makes this statement with his personal experience of driving for over 30 years. According to him he used to note the

way of driving by the workman for over 2 years and he noticed that for about 6 months before the termination no employee of the company was ready to sit in the car on which the workman was the driver. He also states that the workman was sent to an eye specialist for getting his eye sight examined and the expert had recommended glasses and it is a common factor that the workman started using glasses after such examination. As against this, the workman states that even though he was recommended glasses he was in a fit and sound physical condition to drive the vehicle of the company. He admits that about 6 months before the termination of services he was sent to the Doctor and the Eye specialist Dr. Prabhu Dessai examined him and recommended glasses. He has been using glasses since 1985 and produced the certificate dated 12-1-85 Exb.W-6.

In his cross examination different instances are cited regarding warnings given to him. He admits his signature on the warning dated 28-5-1981 Exb.E-4. He also admits his signature on the letter dated 25-1-1985 Exb.E-5. It is suggested to him that during the year 1984-85 he was unable to control the vehicle and he was fumbling while driving the vehicle and he was unable to control the clutch and foot brakes. He also admits that while he was driving the company vehicle Adv. B. G. Kamat along with family members met with an accident and it is probably suggested that he was rash and negligent in driving. This is the sum and substances about the evidence regarding the physical fitness of the workman-driver and the question is whether this is really a case of loss of confidence.

Shri B. G. Kamat while making submissions on behalf of the employer did make out a case that what is necessary is the subjective satisfaction of the employer regarding the physical fitness of the workman and the employer has led proper evidence that the employer had lost confidence in the capacity of the workman as a driver. In this regard, they rely on the observations of a Division Bench of the Kerala High Court, in the case of Boots Pure Drug Co. (India) Ltd., v/s K. C. Bastian and another, their driver reported in 1977, II LLJ page 113. Therein his lordship P. Govindan Nair, Chief Justice has observed that :

> "We do not wish to say anything more on this aspect but would like to indicate that the post of a driver is different from the post of a worker in a factory or some other employee who it may be said is ordinarily remotely controlled by the employer. Such an employee in the factory does not come into daily contact with the employer and his every action would not have some repercussion on the employer, as in the case of a Manager sitting in a car driven by the driver. We must also say that an employer may bonafide loss confidence on a driver for reasons or grounds which another may not consider reasonable or just. In such cases the subjective satisfaction if honestly arrived at by the employer may be sufficient for an employer to say that he has lost confidence in his driver. We shall again guard ourselves by saying that we are not weighing the balance on one side or other by making these observations but only indicating by way of guide lines as to what is the approach to be made in cases of this type".

Their lordships were studying the difference between the case of a driver and the case of a worker of some other employer in the factory where the employee is remotely controlled by the employer. In the case of the driver, the employer or his representatives are also present personally and they have an opportunity to observe the way of driving and to substantiate their case they have held the evidence of the two witnesses. Considering the evidence along with the observations of the Kerala High Court, I feel that the case of a driver stands on a different footing and when once the employer feels that the driving of their driver is not safe it cannot be said that they should be compelled to continue the services of the driver in whose driving capacity they have lost confidence. There is also another case of Bombay High Court relied on by the management reported in 1988 Lab. I. C. 1396 wherein his lordship Dhabe J. was considering the case of a driver of Maharashtra State Road Transport Corporation. Therein the services of the driver was terminated on the similar ground of loss of confidence under Regn. 61 and order not by way of punishment for misconduct. Their lordships felt that order of termination falls within the definition of word "Retrenchment" and the order of retrenchment would be illegal if the provisions of Sec. 25F are not complied with. In the instant case I find that the provisions of Sec. 25F are fully complied with and the workman-driver admits that he has been given the retrenchment compensation and he admits in his cross examination at page 4 that after the termination of his service dated 25-1-85 he collected the cheque from the cash department regarding the legal dues and he received an amount of Rs. 12,663.58 and he encashed the cheque on 28-1-85. Hence on his showing all his legal dues were paid to him. He also admits that after the termination of his service he is driving the vehicle which is a Pickup Van bearing no. GDZ — 7117 belonging to one Suresh Phadte of Margao. He admits that the family of Suresh Phadte owns two to three vehicles and he is the only driver with them. He drives the vehicles for them and stays with them as if he is the member of the family. This also shows that after his retrenchment he is gainfully employed elsewhere. I feel that the provisions of Sec. 2(00) read with Sec. 25F of the I. D. A. are duly and properly complied with by the management while retrenching the workman from service.

There is however, only one snag about the retrenchment namely the actual date of service. The workman is no doubt questioned in his cross examination and he admits that he made an application for appointment dated 18-10-73 which is at Exb. E-1 and letter of appointment is Exb. E-2 dated 17-10-73. So on record he is no doubt appointed in October, 1973. However, there is evidence showing that he was earlier appointed in the Mines and he was appointed on 26-8-70 but by an oral order. From the Mines, he was brought

to the Head Office in October, 1973 and was issued a letter of appointment as shown above. This shows that while paying the retrenchment compensation the workman has not been paid the legal dues for the period between 26-8-70 to 18-10-73. I hold that the workman is entitled to the retrenchment compensation for this period but I maintain that the order of termination is otherwise just and legal. I therefore answer the Government reference accordingly and pass the following order.

ORDER

It is hereby held that the action of the employer of M/s. Sociedade de Fomento Industrial Private Limited, Margao, Goa in terminating the services of Shri Vithoba Shankar N. Dessai, Driver, w.e.f. 26-1-1985 is legal and justified, the action being retrenchment from services within the meaning of the term u/s 25F of the I. D. A.

By way of relief, it is directed that the management of Party II do pay to the workman retrenchment compensation as required u/s 25F of the Act for the period between 26-8-70 to 18-10-1973.

In the circumstances of the case, there shall be no order as to costs.

Inform the government accordingly about the passing of the award.

S. V. Nevagi
Presiding Officer
Industrial Tribunal.

Order

No. 28/80/84-LAB.

The following Award given by the Industrial Tribunal, Goa, Daman and Diu is hereby published as required under the provisions of Section 17 of the Industrial Dispute Act 1947 (Central Act XIV of 1947).

By order and in the name of the Governor of Goa.

Subhash V. Elekar, Under Secretary (Labour).

Panaji, 18th September, 1989.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri S. V. Nevagi, Hon'ble Presiding Officer)

Ref. No. IT/11/85

Shri K. H. Kulkarni — Workman/Party I
V/s
M/s. Burmah Trading Corporation Limited. — Employer/Party II

Workman represented by Adv. Guru Shirodkar.

Employer represented by Adv. G. K. Sardessai.

Panaji, dated : 30-8-1989.

AWARD

This is a reference made by the Government of Goa. by its order No. 28/80/84-ILD dated 18th April, 1985 with an annexure scheduled thereto which reads as follows :

> "Whether the action of the employer M/s. The Bombay Burmah Trading Corporation Ltd., Cochin in superannuating the services of Shri K. H. Kulkarni, Main Depot Keeper at Margao w. e. f. 6-5-1982 is legal and justified.
>
> If not, to what relief the workman is entitled to?"

In this government reference Exb. 1 registered on 2-5-85 the only point involved as seen from the above reference is regarding the superannuation of the workman namely a Main Depot Keeper by name K. H. Kulkarni, hereinafter referred to as 'Kulkarni' w.e.f. 6-5-82. The industrial dispute was registered at his instance after he was retired from the services on 6-5-82 and in the conciliation proceedings the Labour Commissioner failed to arrive at any conclusion and upon the failure report submitted by him to the Government of Goa, the above reference came to be made to this Tribunal and the same was registered as stated above.

In his claim statement Exb. 2 the workman Kulkarni reiterates the stand that the age of retirement of the employees of Party II/Corporation is deemed to be 55 years while according to him the age of retirement should be 60 years or at the most 58 years. Hence the main contention raised by him is that he was prematurely retired and he ought to have been allowed to continue in service atleast for 3 more years. As against this the Corporation having different branches all over India contended in their written statement Exb. 3 that the workman Kulkarni has been rightly superannuated and has been retired on 6-5-82 as according to the Coporation the retirement age of its employees in 1982 was 55 as till then the negotiations with the union were going on and the settlement which took place in 1984 fixed the age of retirement at 58 and this settlement was done with the union of the employees and those who were in service of the Corporation got the benefit of the fixation of the age of retirement. However, Kulkarni who was already retired on 6-5-82 could not take the advantage of the settlement which took place well after his retirement. Hence it is contended by the Corporation that their order superannuating the workman Kulkarni as on 6-5-82 is perfectly legal and justified and the same cannot be interferred at the late stage. To this, the workman filed his rejoinder Exb. 4 contending that he was informed that he was governed by the terms and conditions of the services of the staff of the Cochin division where the retirement age was 55 years and this was applicable to the employees at Cochin division. According to him this is not applicable to him and the conditions of his services may be either as a result of a statement or may be according to the practice as well as understanding. According to him, till 1984 the position regarding the age of retirement was somewhat fluid

and it was for the first time that by a settlement dated 23-4-84 the retirement age was fixed at the completion of 58 years. According to him in the absence of any fixed rules regarding the age of retirement he must be deemed to be entitled to the terms of settlement under which the age of retirement is fixed at completion of 58 years. The Corporation has also raised a point regarding the Party I Kulkarni not being a workman within the meaning of the definition of the term under the Industrial Disputes Act. The Party I claims that he was very much a workman and this matter is properly brought before the Tribunal by raising an Industrial dispute.

With the above pleadings and with the main point involved in the above government reference my Predecessor framed two issues on 6-11-85 and a third issue on 17-1-86 regarding Party I being a workman or not which are at Exb. 5 and they read thus :

ISSUES

1. Whether the employer/Party II proves that the workman/Party I having accepted his retirement/ superannuation is stopped from raising the issue of age of retirement ?

2. Whether the employer/Party II proves that the workman / Party I having accepted temporary employment is now debarred from contending that the dispute regarding retirement age still subsists ?

3. Whether the employer proves that the Party I is not a workman ?

The issue regarding the Party I not being a workman was not pressed by the Corporation and as such the first two issues alone remained for consideration. Even though issue no. 1 raises a plea of estoppel workman Kulkarni having accepted his superannuation and the issue no. 2 relates to the workman Kulkarni having accepted a temporary employment for 3 months after his retirement the question is whether he was debarred from contending that he still continued in service. The crux of the whole matter lies in the government reference. The above two issues are more or less on technical points and the main issue involved in this case as seen from the government reference is the superannuation and retirement of Kulkarni w.e.f. 6-5-82 and it has to be seen whether the action of the management of the Corporation in so retiring him is just and legal in the circumstances of the case.

About the actual evidence led in the case the same consists of the oral testimony of Kulkarni which is at Exb. 8 and as against this the Corporation have examined their Manager (Personnel and Legal) by name Dewakarn Moorkath Achan who is examined at Exb. 29. Along with the two oral testimonies many documents are produced on record and I shall assimilate the facts to understand the correct position in this matter.

It appears from record that Kulkarni who joined the services of the Corporation in 1963 was brought to this Zone in 1970 as evidenced by the appointment letter Exb. W-11 dated 15-10-1970, under which he was posted at Margao depot as a Depot Incharge. There is then the letter of retirement Exb. 14(W) dated 2nd April, 1982 which mentions that as per the Company record Kulkarni completed the age of 55 years on 6th May, 1982 and he was to retire from that day. There is no dispute as regards the correct age of Kulkarni and so as per Exb. 14(W) he was to retire on 6th May, 1982. In the meantime another development took place namely there was no reliever to Kulkarni from Margao Depot. Hence by a letter dated 3-5-82 Exb. 15W the workman Kulkarni was reappointed for a period of three months w.e.f. 7th May, 1982 on the same consolidated salary namely Rs. 1500/- p. m. As per this letter he was to serve for three months and his service was to stand terminated automatically at the end of three months viz. on 6-8-82. This is how even though the letter of superannuation was issued to Kulkarni on 2-4-82, Kulkarni retired on 6th August, 1982 and all these facts are well admitted.

While Kulkarni was in service for a temporary period of three months after the retirement age of 55 he requested the management for extension for three years on the ground of his domestic difficulties. The management refused the extension. The workman Kulkarni nursed a belief that some other workmen were given extension for 3 years and why not he himself ? As the management refused to give him extension the workman by a letter Exb. 16W dated 19-10-82 raised an industrial dispute informing the management that his retirement on 6-5-82 was wrongful, unjust and illegal and that he was entitled to reinstatement on the same post with continuity of service and full back wages from 6th May, 1982. Till then the Corporation did not have any Standing Orders and the workman claims that in the absence of the Corporation Standing Orders the General Standing Orders are attracted. So also, according to him the Corporation is governed by the Shops Act and under the Model Standing Orders as well as the Shop Act the age of retirement is 60 years. Hence he should be deemed to have been continued in service till attaining the age of 60 years and if the settlement prescribing the age of retirement at 58 is taken into consideration he should be deemed to have been continued in service till 6-5-85. Hence on any count the age of retirement is not 55 and as such he is entitled to the benefits.

While countering the claim the management had led the evidence showing that some other workmen who had completed the age of 55 years retired similar to Kulkarni. While countering this claim it is urged on behalf of the workman Kulkarni that the letters of appointments of all those workers clearly mention that they were to retire at the age of 55. Thus as the clause of retirement was specifically incorporated in their appointment letters they were retired upon completion of 55 years. However, he claims that in his letter of appointment Exb. 11(W) there is no such condition mentioning the age of retirement and as such he is entitled to continue even after the age of 55 years. However, as a parallel example he refers to the case

of one Patil whose letter of appointment was similarly silent. However, this Patil was fortunate enough to be in service when the settlement took place in April, 1984, and when he raised the question with the management, Patil was informed that his retirement age which is not mentioned in the letter of appointment is 58 and he gets benefit of the settlement dated 23-4-84. By citing the example of Patil workman Kulkarni reiterates that similar benefits should be extended to him and he is entitled to remain in service till the completion of the age of 58. On this count reliance is placed on the observations of the Supreme Court in a case reported in A. I. R. 1984 S. C. page 356. This is the sum and substance of the submissions made on behalf of the workman.

While countering the above claim it is submitted on behalf of the Corporation that this is an individual dispute raised by an individual workman and this is not a dispute raised by a union on behalf of the workman seeking the fixation of the age of retirement. It is claimed that Section 2(a) of the Act should be considered along with this proposition. Incidently, it has to be pertinently noted that the management of the Corporation also relies on the observations of the Supreme Court in the 1984 case referred to above. Hence, I shall study the legal aspect at a bit later stage and I shall analyse the case made out by the management. The first point made on behalf of the management is that throughout his service the workman was fully conscious and was quite aware of the age of retirement being 55 because when he was to be retired on 6-5-82 he had requested the management by writing the letter dated 14-4-82. In this letter vide Exb. 19(E) the workman Kulkarni had asked for extension in service on account of domestic difficulties and he had requested the management to take into account his sincere and loyal service for the preceding 19 years in giving him extension. He was given a reply Exb. 18(W) on 29th June, 83 informing him categorically that according to the rules and practice prevailing in the Corporation the age of retirement in the Corporation is 55 years and no extension could be given in his case. This is how according to the Corporation this was a closed chapter as on 29th June, 1983 and the continuation of Kulkarni for 3 months was another matter because it was a fresh appointment and Kulkarni who was due to retire on 6th May, 1982 was to automatically retire on 6th August, 1982. Hence the period for 3 months from 6th May, 1982 according to the Corporation cannot be taken as extension but this was a fresh appointment and all these facts are very clear in the correspondence which is at Exb. 21(E), 22(E), 23(E) and 24(E). The letter Exb. 24(E) dated 12th August, 1982 is the last attempt made by Kulkarni to get an extension wherein he has requested the management to use their discretion in his favour and to give him an extension atleast for 2 years. There is then another letter written by Kulkarni Exb. 25(E) dated 14th Sept., '82 seeking reply to his two earlier letters requesting for extension of 3 years. To this by their reply dated 28th Sept., '82 Exb. 26(E), the management informed Kulkarni that the retirement age of the staff of the Corporation continued to be 55 years and no exception could be made in the case of Kulkarni. With this background the settlement took place and the workman had raised the industrial dispute before that. We have to consider the position in the light of the developments which took place from 6-5-82 and see whether Kulkarni is entitled to any benefits in the circumstances of the case.

In this regard it has to be noted that the agitation for the age of retirement along with the other demands was started by the Union right from 1974. The Union had raised a demand that the retirement age should be 60. This impliedly suggests that till then the age of retirement fixed by the Corporation was 55 and this was not to the liking of the Union. Hence demands were being raised by the Union and some settlements were being done from time to time. There is then a settlement dated 25th Aug., 1981 Exb. 27(E) under which material benefits including revision of pay scales, Dearness Allowance, provisions for encashment of leave were given to the workmen. This workman Kulkarni as well as his colleague Patil got the benefit and as on 25th August, 1981 the salary of Kulkarni was raised to Rs. 1626/- p. m. while that of Patil was raised to Rs. 1080/- p. m. obviously he being comparatively junior to Kulkarni. This benefit is derived by Kulkarni and the settlements took place from time to time and they are settlements dated 23-10-74, settlement dated 14-11-77, settlement dated 27-4-78, settlement dated 7-7-80, and settlement dated 3-8-83. Lastly the settlement took place on 23-4-84 and under clause (4) the age of retirement was settled on the completion of 58 years and this was to take effect from date of signing of the agreement viz. 23-4-84. This clearly shows that those who were in service on the roll of the Corporation on 23rd April, 1984 got the benefit of the raising of the retirement age to 58. Presumably it has to be held that till then the age of retirement was less than 58 and the Corp. has led the evidence showing that the age of retirement was 55. In support of its contention the Corporation has led the evidence at Exb. 33(E) Exb. 34(E), Exb. 35(E) and Exb. 36(E) showing those all employees mentioned therein were retired at the age of 55 and no distinction was to be made in case of anybody then. It appears that this retirement age of 55 was causing hardship to the employees and the Union had raised the dispute by submitting the charter of demands and ultimately it was successful in getting the age of retirement raised at 58 as seen above. The main question however is whether this settlement does give any benefit to Kulkarni and Kulkarni states that the workman Patil whose case was similar to him got the benefit but he could not avail of the benefit. With all sympathies for Kulkarni it has to be noted that his case stands on a different footing from that of Patil because till 23-4-84 Patil was very much in service. At that time the appointment letters of other workmen were mentioning that their age of retirement was 55 while the appointment letter of Patil was silent on this point. So Patil took up the matter with the management and the management informed him in writing that Patil got

the benefit of the settlement and his age of retirement would be 58 years. This parallel cannot be considered as an example in the case of Kulkarni because he had already retired similar to the other workman covered by Exb. 33(E) to 36(E). All these workmen stand on a common footing and no distinction whatsoever can be made in the case of any of these workmen including workman Kulkarni.

Adverting then to the legal opinion and the case law relied upon by both Kulkarni as well as the Party II/management I find that the facts of that case are clearly distinguishable and Kulkarni cannot take any advantage of that case. It is no doubt true that the workman of Bharat Petroleum Corporation Ltd., which is a very big Corporation having its office at Bombay had raised through the Union the industrial dispute because they were members of clerical staff and were being retired at the age of 55 years. The Union on their behalf had claimed the raising of the retirement age to 60 while the Industrial Tribunal Bombay fixed the age of 58 years. The Tribunal thought that in the interest of industrial harmony, it would be proper to raise the retirement age of the clerical staff to 58 years only and not to 60 years. In the subsequent appeal under article 136 of the Constitution the Supreme Court raised the retirement age to 60. It has to be noted that their lordships of the Supreme Court have started discussing the matter saying that the workmen of the Bharat Petroleum Corporation Limited, Bombay raised an industrial dispute with regard to the retirement age of the clerical staff employed in the Refinery Division of the Bharat Petroleum Corp. Ltd., Bombay. This was a demand raised on behalf of the workmen and the Tribunal as well as the Supreme Court were to consider the position for Bombay region. The Supreme Court while raising the age of retirement to 60 have discussed many previous cases of the Supreme Court including the case of Guest Keen Williams Pvt. Ltd., Dunlop Rubber Company Limited and Shaw Vallace & Co. While discussing these cases the Supreme Court felt that it should take into consideration what are the retirement benefits and other amenities available to the clerical staff and what is the age of retirement fixed in the comparable industries in the same region and lastly and importantly " what is the general practice prevailing in the industry in the past in the matter of retiring its employees". This last clause is important and the Supreme Court was considering the practice prevailing in the Company and it ultimately gave the decision which I feel that is not applicable to the facts of the present case because it was an industrial dispute raised by the Union and no case of single clerical staff was considered therein. The Supreme Court was also considering the practice prevailing in the industry and here we find that the practice prevailing in the Corporation was retiring the employees at the age of 55. This principle of considering over all practice in the industry is also considered by the Bombay High Court in the case reported in F. L. R. Vol. 54, 1987 page 389 wherein the Bombay High Court have observed that while fixing the age of retirement over all practice has to be seen and over all circumstances have got to be considered. This is how the legal opinion so far as the present dispute goes does not come to the aid of the workman who has missed the chance of getting the benefits of the settlement which took place in April, 1984, about two years after his retirement. Here the time cannot turn anticlock wise and those whose cases were already over meaning by virtue of retirement cannot be reopened in view of subsequent settlement. This is how the position stands and while considering the above government reference this Tribunal cannot come to any other conclusion to award any benefit to the workman who was unfortunate enough to retire before the settlement arrived at between the Union and the management. The action of the management is therefore quite just and correct in the circumstances of the case. In the result, I answer the government reference accordingly and while answering the two issues I hold that the workman was retired on superannuation and he cannot raise the issue on retirement now. So also after the fixation of the age of retirement on 6-5-82 the workman had temporarily accepted a job for 3 months and hence he is debarred from contenting that the dispute as regards the retirement still subsisted after the extension of the new assignment. Hence on this count also the finding goes against workman. In the result, I pass the following order :

ORDER

It is hereby held that the action of the employer M/s. The Bombay Burmah Trading Corporation Ltd., Cochin, in superannuating the services of Shri K. H. Kulkarni, Main Depot Keeper, Margao, w.e.f. 6-5-1982 is legal and justified. In view of the above finding, the workman is not entitled to any benefit or relief in this government reference.

In the circumstances of the case, the parties are directed to bear their own costs.

Inform the government accordingly about the passing of the award.

S. V. Nevagi
Presiding Officer
Industrial Tribunal.

Order

No. 28/2/88-LAB

The following Award given by the Industrial Tribunal, Goa, Daman and Diu is hereby published as required under the provisions of Section 17 of the Industrial Dispute Act, 1947 (Central Act XIV of 1947).

By order and in the name of the Governor of Goa.

Subhash V. Elekar, Under Secretary (Labour).

Panaji, 28th September, 1989.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri S. V. Nevagi, Hon'ble Presiding Officer)

Ref. No. IT/12/81

Shri Cyril Fernandes — Party I
V/s

The Principal,
Presentation Convent High
School, Margao. — Party II

Party II represented by Adv. B. D'Souza.

Panaji. Dated : 24-8-1989

AWARD

This is a reference made by the Govt. of Goa, by its order No. 28/1/79-ILD dated 23-4-81 with an annexure scheduled thereto which reads as follows :

> "Whether the action of the management of the Presentation Convent High School, Margao, Salcete-Goa, in terminating the services of Shri Cyril E. Fernandes, ex-teacher, with effect from 10-6-1974 is justified and to what relief he is entitled ?"

The above Govt. reference is dated 23-4-81. However, the wheels of the machinery of the school of which the Party I was a teacher had started moving way back in 1974. In order to understand the time gap between 1974 to 1981, the events in chronological sequence will have to be studied and the present proceeding has a chequered career and history. The Party I/Workman herein-after referred to as a 'teacher' and the Party II would be referred to as the 'Society' which runs the Presentation Convent at Margao and the action is against the teacher taken by the Principal of the Society. The Principal acting on the advice of the Society issued a letter dt. 10-6-74 dismissing the teacher from service. This action was taken by the Principal under rule 74(2) of Grant-In-Aid-Code. At the relevant time the teacher was a permanent teacher and the rule envisage that when the management decides to terminate the services of a teacher who is permanent; the management may terminate the services without assigning any reason by giving compensation as laid down under sub-rule 2(i). As per the proviso to sub-rule 2(i) the employees cannot be removed without the prior approval of the Dy. Director of Education concerned. Consequently, the Principal wrote to the Director of Education on 6-5-74 seeking approval for its proposed action of dismissal of the teacher. The Director of Education went through the record and papers and accorded the permission on or about 20-5-74. Consequently the order of termination was passed on 4-6-74, the letter of termination was issued on 5-6-74 and the teacher was removed from service w.e.f. 10-6-74. The teacher who is an active person having a social background was then working as a Secretary to the teachers in Goa who had formed a sort of Association. Hence the teacher who had assumed a particular status in the Society felt that his abrupt termination was a sort of slur on his reputation and it was a matter of prestige for him. Hence he did not take the order of termination lying down but he thought of moving heaven and earth in getting re-addressal. I am constrained to make these remarks in view of the further developments in the matter.

The teacher who had sensed that the management was likely to take some action against him filed Regular Civil Suit No. 82 of 1974 on 1-4-1974. The suit was dismissed being pre-mature. Civil appeal No. 138/74 filed by the teacher was dismissed on 12-10-76. Till then the teacher was pursuing the remedy which according to him was available in the Civil Court. Simultaneously the teacher had filed an appeal to Development Commissioner challenging the order of the Society. The Development Commissioner by letter dated 25-7-74 directed the Society to reinstate the teacher. The Society did not heed to this and on finding that the Society was not going to budge, the Government took the drastic step of stopping the Grant-In-Aid to the School as the school run by the Society was aided school to which the provisions of Grant-in-Code were applicable.

When the grant was stopped the Society filed a Writ Petition before the then Judicial Commissioner. The then Judicial Commissioner who was in the position of a High Court judge went through the record and directed the Govt. to restore the grant-in-aid. The matter before the Judicial Commissioner was in fact between the Society and the Government and the directions were given to the Govt. and the teacher was not directly in the picture. Even then because the grant was stopped at the behest of the teacher the teacher felt that he has a say in the matter and so he went to the Supreme Court and filed C. A. No. 831/76. This C. A. was dismissed by the Supreme Court on 8-9-78 and the Supreme Court while dismissing the C. A. held that the teacher had no locus standi in the matter of grant in aid. However, during the course of the judgment their lordship of the Supreme Court observed that the teacher may agitate his claim before the competent court and/or Tribunal if he has a legal remedy as a workman. The workman then approached the Labour Commissioner in the matter and the Society took a stand that it was a Society which runs a minority school and its action was not subject to any scrutiny by outside agency. Anyway the conciliation proceedings before the Labour Commissioner ended in failure and after receiving the failure report the Government made the present reference u/s 10(1)(d) of the I. D. Act, hereinafter referred to as the Act, on 23-4-81 and the matter is pending before this Tribunal since then. The matter protracted for some time for one reason or the other and in a way my Predecessor is also responsible for the protraction of the matter in as much as he passed two orders which were rather controversial in nature and the matter went up to the High Court. In the first instant by his order dated 9-7-82 my Predecessor declared that issue no. 4 was closed since Party II/Employer has not proved the same and as such it is decided against them. In the second order dated 22-1-82 my Predecessor rejected the request of Party II to get itself represented by the Presi-

dent of their Society Shri Bernard D'Souza, Advocate. The propriety in passing these two unnecessary orders is not known. However Party II filed Writ No. 120/B/82 in the High Court. The Society had asked for a writ of certiorari to quash the Government reference and secondly setting aside the order of Tribunal refusing permission to B. D'Souza to appear for Party II. The High Court held that the objection to the Government reference was premature in nature and observed that an opportunity must be given to the teacher to lead evidence before the Tribunal that he is a workman within the meaning of the term under the Act and then Tribunal can go into the question and decide the matter on the basis of the evidence that may be led before it. On this count the prayer for quashing the reference was rejected but at the same time the matter was sent down to this Tribunal to allow the parties to lead their evidence in the matter. About the representation by Shri Bernard D'Souza that order was quashed and Shri D'Souza is very much appearing and making submissions on behalf of Party II/Society. These are the facts up to the stage of preliminary enquiry. The matter in the High Court was decided in 1986 itself but nobody had taken steps to inform the Tribunal about the same. The office of the Tribunal was also lying in a sort of dormant stage in as much as my Predecessor had retired on superannuation and no Presiding Officer was appointed by the Government of Goa. Hence after I took over the teacher approached me with the order of the High Court dated 17-11-86 and thereafter the wheels started moving and the matter is being heard on merits after notices being issued to the parties. In the intervening stage a mention of one more development has to be made. The Party II, Society filed an application dated 27-7-88 requesting this Tribunal to treat the question of the Society being a minority institution and this Tribunal having jurisdiction and I rejected this application by an order dated 11/8/88 stating that much time had lapsed during the intervening period and a teacher who was out of service since 1974 is yet to get some relief in 1988 and no useful purpose would be served by recording a finding on preliminary issue. Instead, justice would be done to the parties by hearing the whole matter on merits by giving full opportunity to both parties for leading their evidence. It appears that this order was challenged by Party II, by taking the matter in the High Court the writ petition in the High Court, it appears, was not pressed and the matter came down for hearing on merits and the formalities of recording evidence in the matter were followed.

So far as the oral evidence is concerned the Party II had initially examined the Principal of the High School by name Sister Piola Fernandes on 22-6-88 and the matter was sought to be heard on preliminary issue. However, I decided to hear the matter on merits on all issues as stated above and the order was passed by me accordingly and the matter came back from the High Court and was fixed for evidence on 17-4-89 on which day the evidence of the teacher Cyril Fernandes was recorded. Shri B. D'Souza for the Society expressed that the Society was not going to lead any evidence in the matter and the matter was argued over. Initially the Society filed written arguments on 31-5-89 and the teacher filed written arguments on 20-6-89. Simultaneously oral submissions were also made before me on that day and the matter is now set out for judgment.

The C. A. filed by the teacher in the Supreme Court was dismissed and in view of the observations made by the Supreme Court the workman raised an industrial dispute before the Labour Commissioner and the Commissioner held conciliation proceedings which ended in failure and subsequently he made the failure report to the Government. This being the position the first and important point to be considered by me at this stage is whether the action of the management in terminating the services of the teacher is just and proper in the circumstances of the case and whether the teacher is really aggrieved by the order of the management and what reliefs if any is the teacher entitled to in this Government reference. As per the Govt. reference this Tribunal has to find out and see whether the action of the management in terminating the services of the teacher w.e.f. 10-6-74 is justified or not and if not to what relief the teacher is entitled to ? Following this reference issues were also framed and my Predecessor had framed issued No. 1 "Whether the action of the management amounts to victimization and un-fair labour practices and whether the same is in violation of rule 74(2) (3) (5) of the grants-in-aid code and also in violation of the principles of natural justice". I shall first consider the Rule 74(2) which is very clear and specific. If the employee here a teacher is permanent employee the management may terminate his services without assigning any reason. This rule clearly gives a mandate to the management of an aided school in dismissing a permanent teacher but there is a rider to this rule which makes provision for compensation. Hence the main and important factor is whether such compensation was paid or offered to the workman. In the instant case, I am told at the bar that the school in question had the arrangement of paying the salaries of the teachers through the bank and such every teacher had an account in the bank, in this case, the Bank of Maharashtra and the management of the School while issuing the order of termination simultaneously deposited entire amount of compensation as envisaged under rule 74(2) (i), admittedly. The teacher who did not take the order of termination lying down felt that this deposit of the compensation into his bank account would come in his way. So he directed the bank to return the money back to the management. Accordingly the bank sought to return the money back to the management but the management refused to accept the money. Hence the things were in a position of animus suspendi and the bank had no other alternative than to put the money into the Suspense Account there being no taker to it. Be it noted here pertinently that when the matter subsequently went to the Judicial Commissioner the teacher lifted the money from the bank and there is no controversy so far as the compensation money is concerned.

Secondly, the teacher after the order of dismissal served in some school for a year or so and at present

since 1978 he is serving in yet another school and now he has been made permanent in that school and there does not seem to be any question of reinstatement in service and what is agitated before me is the ventilation of the hurt feelings of a teacher who feels that he who was a Secretary of the Teachers Association was rather dismissed in a summary manner and this has lowered his prestige, in the Society. Here we are considering the position in law and what rights a teacher or an employee gets after putting up a continuous service in a Government aided school. Hence we are to consider the position in the four corners of grant in aid and so far as the Society is concerned it had acted strictly under the rule by adhering to rule 74(2) (i) by paying the compensation promptly. There is a provision to this rule namely the prior approval of Dy. Director of Education. In the instant case the Director of Education has accorded the permission and this essential formality has been also duly and properly complied with. Shri Cyril Fernandes did complain that the permission has to be given by Dy. Director and Director cannot grant the permission. I feel that this is a subtle distinction as the Dy. Director is a species of the genus and what can be done by the Dy. Director can be competently done by the Director and so there is no question of any breach of the above mentioned rule and there is due and proper compliance of the rule. The question then remains is what is the grievance of the workman in this case. We find from the record that there was an under-current flowing in the episode which has not specifically come on record. It appears that there was an allegation of misbehaviour and misconduct against the teacher and this had happened at the time of the Parents Day or Annual Day of the school and some girls including a girl by name Tracy had complained to the Principal and the management, about the misbehaviour of the teacher towards them. The Principal made discreet enquiries in the matter and called upon the teacher to give his explanation in the matter. However, the management thought it fit not to proceed further in the matter in view of the reputation of the un-married school girls and dropped the matter of enquiry and resorted to the above rule 74(2) which gave a clear mandate to the Society to dismiss the teacher without assigning any reason. The Society did not mind in paying the heavy compensation envisaged under the rules and so far as the Society was concerned it was an end of the matter. However, the permission of the Dy. Director or Director was necessary and so the Society wrote to the Director about the proposed action and giving some information about the allegations about the teacher. The Director of Education, it seems felt that he should verify the matters and so he called some two three girls to his office; made enquiries with them and was probably convinced about the allegations and so he granted the permission as per the rule and after the permission was received the order of termination was issued by simultaneously paying the amount of compensation. Hence all legal formalities were followed by the Society so far as the termination is concerned. With this background the teacher was questioned by me about his grievances in the matter and what reliefs he seeks in the matter. According to him the Society called the girls and examined them while he had gone to Belgaum to appear for B. A. examinations and according to him the enquiry if any ought to have been held in his presence. Hence this is first objection to the way and manner in which his services were terminated. He in a way admits that this is a non-injurious termination even though this is a termination and he wants to ventilate his grievance in the matter and he has cited one or two authorities of the Supreme Court and the Goa Bench of the Bombay High Court in support of his submissions. Before considering the case law on this point, I shall consider the observations made by the Judicial Commissioner while allowing the petition filed by the management and so also I shall consider the observations of the Goa Bench of the Bombay High Court in this matter and also the observations of the Supreme Court to see whether the workman is really aggrieved by the order of termination and what reliefs if any is the workman entitled to at this belated stage. The observations made in these 3 judicial decisions will be considered to see what point has remained to be decided by the Industrial Tribunal and what point is supposed or expected to be decided by the Industrial Tribunal which is considering the Govt. reference made in 1981 about the termination dated 10-6-74. By the time when the Government reference was made in April, 1981 much water had flown below the bridge of river Mandovi and hence the observations of the superior courts will have to be considered in this context. It has also to be noted that in between 1974 to 1981 the Party I, teacher had made a trip to Civil Courts by filing civil suit no. 82/74 in the Margao Court and the Govt. decision was challenged by the workman by taking the matter to the Government and when the Government stopped the grant to the High School the management went to the High Court namely the court of Judicial Commissioner in Centrally Administered, Goa, and while allowing the writ petition filed by the High School the Judicial Commissioner had made certain observations and those observations are made by him after holding a thorough scrutiny of the papers which were placed before him. This is how I have to consider the observations of the Judicial Commissioner and then I shall advert to the observations of the Goa Bench as well as the Supreme Court.

In Special Civil application No. 100/74. The management of the High School sought to challenge and get quashed the directions given by the Director of Education asking the school management to reinstate the teacher and to conduct an enquiry according to the grant in aid code, hereinafter referred to as the 'Code'. The Director of Education had also directed stoppage of the grant in aid relief to maintenance which was meant for the salary of the staff. While considering this prayer his lordships has reproduced rule 74(2) (i) & 74 (3) (i) of the code and has studied the circumstances under which the services of a permanent employee may be terminated by the management without assigning any reason. Under rule 74(2) (i) the management had the right to terminate the

services of a permanent employee without even assigning any reason but under sub-clause (a) they were supposed to pay 12 months salary and under sub-clause (b) six months' salary if the employee was in service for less than 10 years. In the instant case the compensation under rule 74(2) (i) has been paid by the management and admittedly the same has been accepted by the teacher though reluctantly at a later stage. This is how there is a full compliance of the rule 74(2) (i) so far as the termination case and his lordship was considering the position to find out whether the case of the teacher was distinguishable to attract rule 74(3) (i) which applies to all other cases excepting those cases falling under rule 74(2) (i) of the Code. After discussing the pleadings of the parties and the rules in code in paras 1 to 7 of his judgment his lordship observed in para. 9 of his judgment that Dy. Director of the Education held an enquiry into the matter to ascertain whether the case was a fit one for termination under rule 74(2) of the Code. The teacher had contented before his lordship that the principles of natural justice demanded that the enquiry should be conducted in the presence of the teacher and on this point reliance was placed on an authority of the Supreme Court reported in A.I.R. 1973 Supreme Court, page 1260. It was submitted before his lordship that no open enquiry was necessary and principles of natural justice had been substancially complied. That was the case of Medical College students behaving in an indecent manner at night before the inmates of a Girls' Hostel. A complaint was lodged for trespassing into the premises of the girls' hostel at late night and subsequently called upon to show cause why disciplinary action should not be taken against them for misconduct and were directed to file their reply immediately to the Enquiry Committee. The Committee took statements of the students and the girls also and the students were expelled from the College and Hostel. The Students in the Writ petition before the High Court had contended that rules of natural justice were not followed before the order was passed against them expelling them from the College. According to them, the enquiry if any has been held behind their back and the witnesses who gave evidence against them were not examined in their presence and there was no opportunity to cross examine them with a view to test their veracity. The petition made by the students was dismissed and when the matter went up before the Supreme Court, the Supreme Court made the following observations :

> "The High Court was plainly right in holding that principles of natural justice are not inflexible and may differ in different circumstances. This Court has pointed out in Union of India v. P. K. Roy, (1968) 2 SCR 186 at page 202 that the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula and its application depends upon several factors. In the present case the complaint made to the Principal related to an extremely serious matter as it involved not merely internal discipline but the safety of the girls students living in the Hostel under the guardianship of the college authorities. These authorities were in loce parentis to all the students — male and female who were living in the hostel and the responsibility towards the young girl students were greater because their guardians had entrusted them to their care by putting them in the hostels attached to the College. The authorities could not possibly dismiss the matter as to small consequence because if they did, they would have encouraged the male student rowdies to increase their questionable activities which would, not only, have brought a bad name to the college but would have compelled the parents of the girl students to withdraw them from the Hostel and, perhaps, even stop their further education. The Principal was, therefore, under an obligation to make a suitable enquiry and punish the miscreants. But how to go about it was a delicate matter. The Police could not be called in because if an investigation was started the female students out of sheer fright to harm to their reputation would not have cooperated with the police. Nor was an enquiry as before a regular tribunal, feasible because the girls would not have ventured to make their statements in the presence of the miscreants because if they did, they would have most certainly exposed themselves to retaliation and harassment thereafter. The college authorities are in no position to protect the girl students outside the college precincts. Therefore, the authorities had to devise a just and reasonable plan of enquiry which, on the one hand, would not expose the individual girls to harassment by the male students and, on the other, secure reasonable opportunity to the accused to state their case."

Following these observations of the Supreme Court the Judicial Commissioner felt that the facts in the present case are similar to the facts in Hira Nath Mishra's case in the above reported ruling. His lordship therefore felt no hesitation in accepting the contention of the counsel for the management that the management was justified in holding an in-camera enquiry and there was nothing wrong in it. It appears that his lordship did not consider it necessary to go into the details of the enquiry because Rule 74(2) (i) of the Code was attracted and the services of even a permanent teacher were terminable by the management provided they pay the adequate compensation. It was urged before his lordship on behalf of the Party I teacher that there could be no termination except after previous inquiry as provided by rule 74.3, because a stigma is cast on him by his removal. Some cases were also cited by the Counsel for Party I, teacher in this case. His lordship considered those cases and held that by removal from the service no stigma was attached to the workman because it was a case of termination simpliciter without giving or assigning any reason to do so. His lordship considered in para. 12 of his judgment that the teacher was an employee of a private school whose services can be without any enquiry or without assigning any reason are liable for termination and merely by complying the conditions of his service. His lordship went to the extent of obser-

ving that the Party I, teacher, as an employee of a private entity has no right to demand an inquiry as a condition precedent for the termination of his services. "The Code" is not a statute. It contains a set of rules regulating the relations between the management of a school and the Government. His lordship then relied on the observations in the case of Amratlal Ramanlal and others v. The State of Gujarat and others, A.I.R., 1972 Guj. 260 in which it was observed that the managements of the secondary school act upon the promises the term whereof are to be found in the rules contained in the Code and also agree to bind themselves to act in future as per the said rules. As between the management and the Government such promises and assurances would be enforceable because they are intended to be binding or intended to be acted upon. Thus the Grant-in-Aid Code Rules impliedly constitute the clauses of an agreement between the management of the school and the Government. It is in exercise of the rights arising ex-contratu that Government and Govt. alone can require a school to hold an inquiry as a condition precedent to the termination of the service of a teacher, if such an inquiry is called for. Relying on these observations of the High Court his lordship observed in the above para. 12 that the teacher is just a proforma respondent and has no right vis a vis the management of the school except those which arise from the terms and conditions of his service.

His lordship further observes that Deputy Director of Education has the power to authorise in certain cases of the removal of a permanent employee without an open inquiry. These observations of his lordship in the Special Civil Application No. 100/74 put an end to the controversy as to whether rule 74(2) is attracted or whether rule 74(3) envisaging an enquiry is attracted. The point of the removal of the Party I, teacher without an enquiry is just put an end to, in the above matter which was really a matter between the management of the school and the Government and the point mainly involved was the stoppage of the Grant-in-Aid and in this proceeding the teacher was just a proforma party. As pointed out by Shri De Souza for Party II/management this was an end of the matter and there was no necessity nor any question of re-opening the case but anyhow the matter has been re-opened.

The Judicial Commissioner have found that the Government had directed the reinstatement of the Party I, teacher not of its own because a delegation of the All Goa Secondary School Teachers Association led by President of the Association had met the Development Commissioner and thereafter the decision to stop the grant was taken. His lordship was considering the question of stoppage of grant and he granted the Special Civil Application and quashed the orders of the Director of Education and the Under Secretary in the Education Department directing the reinstatement of the teacher namely Party I, and the stoppage of the grant-in-aid to the school. This is how as submitted by Shri B. D'Souza for the school management there was the end of whole matter and there was no question of reopening the same.

However, as stated in the foregoing paragraphs the Party I, teacher took up the matter to the Supreme Court and the Civil Appeal No. 831/76 was filed in the Supreme Court and the Supreme Court by a brief judgment dismissed it on September 8, 1977. Their lordships of the Supreme Court while confirming the findings of the Judicial Commissioner, Goa observed that the Judicial Commissioner has held that this was a case of termination of service under Rule 74(2) which does not require a regular enquiry as in the case to which Rule 74(3) is applicable. The Supreme Court painfully observed that "In spite of this finding, the judgment contains some remarks like, 'the behaviour of the fifth respondent meaning the Party I, was immodest and immoral' and that though an opportunity was given to him to answer the charges levelled against him, he did not avail of that opportunity. Virtually by making the above observations the Supreme Court have expunged those remarks if any made against Party I workman. While elaborating on this point their lordships of the Supreme Court have observed that "There has been no proper enquiry to find out the truth of the allegations against the appellant, indeed, there was no occasion for any such enquiry as the appellant's services were terminated by applying rule 74(2) of the Grant-in-Aid Code. We hold that these remarks on the conduct of the Appellant are unjustified and should not have been made. Subject to this, the appeal is dismissed".

I feel that the above remarks of their lordships of the Supreme Court have sufficiently ventilated the grievances if any of the Party I/teacher and I feel that there is no room nor any cause to grudge about the fact that no enquiry of any sort is held against him and for no fault of his the management have placed a stigma on his carrier. I feel that there is no stigma nor any remarks passed by any competent authority about his carrier because the enquiry if any held against him was a closed door enquiry and whatever the girls had said against him by way of complaint had gone into oblivion and I feel that no useful purpose would be served by digging the matter over again by accepting the contention of the Party I, that the matter be placed under clause 74(3) of the Code for directing an enquiry to be held through a properly constituted enquiry committee. The episode leading to the complaint made by girl students took place in 1974 and now we are running in the year 1989 and it would be a futile exercise on the part of everybody to direct an enquiry at such a late stage and those girls who had made complaint if any might have been married since long and their children if any might be taking education in the same school. This is a matter which has lost its path in antiquity and it would be a futile effort to dig out the past to re-direct, an enquiry by a properly constituted enquiry committee by envoking Rule 74(3) of the Code. This matter has been properly considered by the Judicial Commissioner of the Union Territory of Goa as then it was and their lordships of the Supreme Court have endorsed the same view but by expunging the derrogatory remarks inadvertently passed against the workman. Hence as back as in Sept., 1977 the Party I, teacher has emerged as a clean person with no stigma

on his career. From the statements made by the teacher before me at the bar he is gainfully employed elsewhere as a school teacher in 1978 after his graduation and he has been confirmed in the services and it cannot be said even by stretch of imagination that he is interested in reinstatement into service and to claim the back wages. By way of clarification I had put certain questions while he was arguing the matter himself before me to understand the view in the matter and from my notes I find that the only grievance which he has to make in the matter is that his services were terminated in June, '74 by invoking Rule 74(2) of Grant in–Aid Code. He admits that the payments envisaged under sub–clause (a) & (b) of Rule 74(2), were deposited in the bank in his salary account and as he instructed the bank the money was lying in Suspense Account and he withdrew the money after the approval was accorded. After giving this information he stated before me that proper rule to be applied to this case was rule 74(3) of the Code. I have dealt in–extense on this point in the foregoing paragraphs and the Supreme Court by endorsing on the decision of the Judicial Commissioner have stated a last word on the point by endorsing that the proper rule applicable was 74(2) and not 74(3). According to the Party I, teacher the enquiry was held behind his back and whatever enquiry was held was improper and was unjust and he claims that there should be an enquiry. The Party I, teacher made a grievance before me that the girls were examined and their statements were recorded behind his back while he was away in Belgaum for attending his B. A. examinations. As repeatedly observed in the foregoing paragraphs it was a closed door enquiry if any and no stigma of whatsoever nature is attached to the career to the workman who has emerged as a clean man after the expunction of the remarks of the Judicial Commissioner by the Supreme Court. This is how the matter had in fact ended in Sept., 1977 only. Since 1977 the teacher served for one year in another school and he joined a service in 1978 where he is made permanent and relying on the observations of the Supreme Court, A.I.R. 1988 S. C. page 37 – 1983 Vol. I LAB. Labour Notes page 373 he states that even though it is a non-injurious terminology while terminating his services still the termination is termination and he feels that he should be given a full hearing in the matter of the enquiry. This is the sum and substance of the submissions made by him before me at the bar and I have already discussed in detail these points in the foregoing paragraphs.

As against this Shri D'Souza for the management of the school did invite my attention to the observations of the Supreme Court which held that the remarks made by the Judicial Commissioner were obiter in nature and they were held to be improper. All the same the Supreme Court did not disturb the findings of the Judicial Commissioner and where is then the question of reconsidering the same facts over again after the Supreme Court decision in 1977 after a lapse of 12 years ? Passingly, he also relied on the finding of the Supreme Court in the case of Sundaraman Bhal, a teacher from Goa. In case of the teacher the Govt. of Goa, refused to make a reference on the ground that the teacher was not a workman. When the teacher took the matter to the High Court the High Court held that she should not insist for a reference. When the matter was taken to the Supreme Court, the Supreme Court upheld the decision of the High Court and held that "the teacher was not a workman". All these developments took place after 1982 or so. But the Govt. reference was made much earlier than that and the reference is made in the year 1981. I am therefore not going into the question as to whether the teacher is a workman or not but I can dispose off this reference as it is by considering the facts which are on record and I have studied the facts up to the stage of Supreme Court decision and I shall now advert to the observations of the Goa Bench of the Bombay High Court giving rise to the Industrial reference.

As stated above the decision of the Supreme Court given in Sept., '77 had put an end of the matter. Their lordships of the Supreme Court had endorsed the view that the decision of the Judicial Commissioner placing the matter under rule 74(2) was quite correct and it was not the case coming under the ambit of rule 74(3) a point which was made before the Supreme Court. The Supreme Court also held that the remarks passed by the Commissioner against the teacher were improper and the remarks were virtually expunged in the judgment dated Sept. 8, 1977. Thus when there was an end of the matter the question is how the industrial dispute came to be raised at all. We find a clue to this in the passing observations made by the Supreme Court in the above judgment. The Supreme Court felt that the persons who were really aggrieved by the order of the Judicial Commissioner were the Director of Education as well as the Govt. of Goa, because they were directed to continue with the Grant–in–Aid while setting aside the order of reinstatement passed by the Director of Education. The Supreme Court observed that the person can claim to be aggrieved if his legal rights are directly effected. The Supreme Court felt that the Appellant teacher was not directly concerned with the question whether the Rules in Grant–in–Aid Code conferred on the management of the school an enforceable right against the Government which is entirely a matter between the management and the Government. So the Appellant who has no say in the matter cannot challenge the finding on the point as the scope of the appeal must be limited to what directly concerns the appellant in the impugned Judgment. Thereafter the Supreme Court held that the remarks passed by the Judicial Commissioner on the conduct of the Appellant/teacher were unjust and should not have been made. In conclusion while dismissing the appeal the Supreme Court observed that "we express no opinion as to whether on the facts of the case the appellant, teacher has any legal claim against the management of the school, if he has, he is free to enforce it in an appropriate forum." It appears that a clue was taken from this observation and the industrial dispute was raised before the Labour Commissioner by the teacher by writing a letter dated 4th May, 1978. The failure report was made on 21st April, 1980

and the Govt. acting on the report made the reference to this tribunal on 23-4-81 and the matter came to be registered in this Tribunal and one or two interim orders passed by my Predecessor gave rise to the Writ Petition No. 120/B/1982 filed in the Goa Bench of the Bombay High Court and their Lordships of the Panaji Bench by a judgment dated 16-1-87 set aside the two orders of my Predecessor and remitted the matter directing the Tribunal to decide the issues afresh giving opportunity to the parties to lead evidence if desired. After I took over, evidence was led before me and I passed an interim order holding that the entire matter would be heard by me on merits and I would dispose off the same according to law. This order was challenged by Party II/management by filing a petition in the High Court but that petition was dismissed as not pressed and the matter came up before me for hearing and the statements of the teacher Cyril Fernandes is recorded before me on 17-4-89 and he has reiterated the same points which I have discussed in the foregoing paragraphs. The management did not think it necessary to lead any further evidence on their behalf and the matter was argued over and I have also considered the points canvassed before me in the foregoing paragraphs. At the cost of repetition I re-state here that the only point made before me by Party I, teacher Cyril Fernandes is that Rule 74(3) is applicable and if that rule is applicable there should be an enquiry. According to him the summary dismissal, the way and manner in which it has been made by the management has caused a stigma on his career and he wants to wipe it out by facing the enquiry and by proving that he was innocent and that there was no substance in the allegations made by the girls way back in 1974. I am not inclined to consider this request for two major reasons.

The first and important reason which is a point of law is that the Judicial Commissioner in his judgment dated 20-11-75 had stated in un-equivocal terms that the matter of the stoppage of the Grant-in-Aid was a matter between the management and the Goverment and the Judicial Commissioner while setting aside the order of the Government stopping the Grant-in-Aid had held that the rule 74(2) of the Code was attracted and rule 74(3) was not attracted. This was a finding in judicial proceedings and when the matter was challenged before the Supreme Court by filing Civil Appeal No. 831/76, the Supreme Court in their judgment dated Sept. 8, 1977 have clearly observed that there was no question of considering whether there was no proper enquiry and to find out the truth against the allegations against the Appellant teacher because there was no occasion for any such enquiry as the Appellant's services were terminated by applying Rule 74(2) of the Grant-in-Aid Code. Hence while upholding the decision of the Judicial Commissioner in this regard what their lordships of the Supreme Court have done is that they observed that the remarks passed against the Appellant teacher were unjustified and such remarks should not have been made. This is how before the Supreme Court itself the Party I, teacher was sufficiently exhonorated and there was no question of any stigma being attached to the fair name of the Party I, teacher. Hence, I feel that he is nursing a wrong feeling that the order summarily dismissing him from services passed in June, 1974 was going to affect his career in future. The events which took place in future show that thereafter the Party I, teacher served for one year in one school and in 1978 he joined another school where he is confirmed in the service and he is serving there till this day. If a general survey of all these events is taken and if we came to a conclusion that in fact there was no enquiry held against the teacher and there was no necessity of holding any enquiry against the teacher the only question which survives for consideration is the justification of the action of the management in dismissing the teacher from service by an order passed on 10th June, 1974 under rule 74(2) of the Grant-in-Aid Code. The things took another turn when the Director of Education, Govt. of Goa, did not accept the said order of termination and made an order requiring the management to reinstate the teacher by his order dated 25th July, 1974. This order has been held to be unjust and improper by the competent court of Judicial Commissioner and the finding is confirmed by the highest court of the land namely the Supreme Court, and this is how the question of re-considering the order of termination passed by the management dated 10th June, 1974 itself does not survive for any scrutiny much less a judicial scrutiny. It is no doubt true that the Labour Commissioner made a failure report and the Government of Goa, acting on the report made a reference to this Tribunal. As observed by the Judicial Commissioner the Government was also probably under pressure because the delegation of All Goa Secondary School Teachers Association led by the President of the Association had complained on behalf of the teacher and the Development Commissioner had taken a cognizance of the complaint and gave the decision which was subsequently challenged. Hence simply because the Government made a reference to this Tribunal, it cannot be said that there really existed an industrial dispute to be considered by the Industrial Tribunal. All the things have been discussed in-extenso in the foregoing paragraphs and what the Tribunal is called upon to decide by the Government reference is whether the action of the management of the high school in terminating the services of the teacher w.e.f. 10-6-74 is justified and if not, to what relief the teacher is entitled to. The plain reading of the Govt. reference shows that the tribunal has now to consider whether the action of the management is justified in the given circumstances.

In this regard it has to be stated that the management of the Presentation Convent High School, Margao has acted in a very tactful manner. They very well knew that if they placed reliance on Rule 74(2) of the Code they will have to pay heavy penalty by way of the salary for 6 months to 12 months, if they wanted to avoid holding an enquiry into the matter. The school is a girls school and the complaint was made by some of the girls in the school and if an enquiry was to be held in the matter it would have been a sensation which would have adversely affected the reputation and fair name of the High School. Hence what the manage-

ment did do was to hold a discreet enquiry in the matter by calling the girls including Lidia one after another and after convincing themselves that some such untoward incident had taken place the management thought it wise to take shelter under Rule 74(2) and the management was prepared to pay the salary for 12 months or 6 months as the case may be. Hence while issuing the impugned order of termination dated 10th June, 1974 the management simultaneously took steps to deposit more than Rs. 10,000/– in the salary account of the teacher in the bank and the teacher was entitled to receive this amount. By present standard of Rs. 10,000/– is not a small amount in 1974. Here we find three things which have to be noted pertinently. Here, there was no question of any victimisation because the rule clearly gives a right to the management to terminate the services of a permanent employee without assigning any reason and the only obligation cast on them is to pay the compensation and the management did not mind paying such compensation. So the second point is that the teacher was fully and sufficiently compensated. The third point is that there was no enquiry held against the teacher at all. What was stated behind his back in hush hush manner is not a point for consideration and on a plain reading of the order of termination it goes without saying that it was a pure order of termination simplicitor without assigning any reason and the compensation was not only offered but was actually paid to the teacher. Hence on all counts the management had observed all norms and have acted in a very fair manner and had not given any scope for making any complaint by the aggrieved teacher. This same rule whenever applicable to any other permanent teacher against whom there was such complaint or alleged complaint action of the management would have been justified. Hence where is the question for the Party I, teacher to make a complaint of the whole episode and show that he is aggrieved in the whole matter? The only point under the Government reference is whether the action of the management is justified or not and upon a overall consideration of the facts, evidences and circumstances of the case, I came to an irresistable conclusion that the action of the management of the High School is not only just but the same is proper in the given circumstances. The Judicial Commissioner has clearly remarked and indicated that the exposure of the girls to an enquiry before an enquiry committee would not have been proper and the observations of the Supreme Court have been considered by me in the case of Hiranath Mishra v/s The Principal, Rajendra Medical College, Ranchi and another reported in A.I.R. 1973 S. C. 1260. In that case the question involved was similar and the question was whether the girls before whom the hostel students had misbehaved should be examined in the Domestic Enquiry or not and the Supreme Court endorsed a view that there was no necessity of holding a domestic enquiry wherein the girls were supposed to be examined. Hence the Judicial Commissioner relying on the Supreme Court ruling has already held that the action of the management in invoking rule 74(2) for avoiding the domestic enquiry is just and proper and this contention is endorsed by the Supreme Court and the observations of the Supreme Court are already considered by me. This Tribunal is bound by the judicial decisions and this Tribunal cannot come to any different conclusion to hold that rule 74(3) is attracted and rule 74(2) is not attracted. The only point made before me by the teacher Shri Cyril Fernandes was that rule 74(3) may be held to be applicable so that there would be an enquiry in the matter and I find that this claim made by him is not sustainable and the action of the management is just and proper in the circumstances of the case. I, therefore, answer the Government reference accordingly. About the relief if any the teacher is already compensated sufficiently by paying the adequate compensation and as such this is not a case where any injustice is caused to the teacher. Rightly or wrongly the matter came up to be raised by way of an industrial dispute while in fact there was an end of the matter when the Supreme Court had dismissed the appeal filed by the workman. Hence on all counts I answer the Government reference as per order below:

ORDER

It is hereby held that the action of the management of the Presentation Convent High School, Margao, Goa, in terminating the services of Shri Cyril E. Fernandes ex-teacher w.e.f. 10-6-74 is fair and justified.

About the reliefs the teacher has been already compensated sufficiently while issuing the above order of termination. Hence the teacher is not entitled to any other relief in this matter of Govt. reference.

In the circumstances of the case the parties are directed to bear their own costs.

Inform the Government accordingly about the passing of the award.

S. V. Nevagi
Presiding Officer
Industrial Tribunal.

Order

No. 28/26/88-LAB

The following Award given by the Industrial Tribunal, Goa, Daman and Diu is hereby published as required under the provisions of Section 17 of the Industrial Dispute Act, 1947 (Central Act XIV of 1947).

By order and in the name of the Governor of Goa,
L. J. Menezes Pais, Under Secretary (Labour).
Panaji, 11th May, 1990,

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI
(Before Shri S. V. Nevagi, Hon'ble Presiding Officer)

Ref. No. IT/33/88

Shri Prabodh Patyekar & 3 Others — Workmen/Party I

V/s

M/s. Creative Market Consultants, Panaji-Goa. — Employer/Party II

Ref. No. IT/48/87

Shri R. B. Kakodkar & Others — Workmen/Party I
V/s
M/s. Creative Market
Consultants, Margao-Goa. — Employer/Party II

Party No. I represented by Shri S. V. Concolienkar.
Party No. II represented by Adv. B. G. Kamat.

Panaji. Dated : 23-4-1990

AWARD

Ref. : IT/33/88

This is a reference made by the Govt. of Goa, by its order No. 28/26/88-ILD dated 5th October, 1988 with an annexure scheduled thereto which reads as follows:

"Whether the action of the management of M/s. Creative Market Consultants, Panaji in terminating the services of four workmen namely S/Shri Prabodh P. Patyekar, Frederick Mascarenhas, Miss Perpetua Rodrigues and Miss Anjeli Acharya with effect from 15th January, 1987 is legal and justified.

I not, to what relief the workmen are entitled to ?"

Ref. : IT/48/87

This is a reference made by the Government of Goa, by its order No. 28/10/87-ILD dated 28th May, 1987 with an annexure scheduled thereto which reads as follows :

"Whether the action of the Management of M/s. Creative Market Consultants, Margao in terminating the services of the following 9 workmen with effect from 18-11-1986 is legal and justified.

1. Shri R. B. Kakodkar,
2. Shri V. R. Raikar,
3. Shri Alexander Alvares,
4. Shri Madan Poi Kakode,
5. Shri Rosario Albuquerque,
6. Miss Diana Alphonso,
7. Miss Flory D'Souza,
8. Miss Loreine Fernandes,
9. Shri Onofre G. Pereira.

If not, what relief the workmen are entitled to ?"

These are the two Government references in which we are concerned with the demands made by the ex-workmen of Party II M/s. Creative Market Consultants having its head office at Aquem, Alto, Margao, Goa. The ex-employees of this concern of the main branch are 9 in number and their services are stated to have been terminated w.e.f. 18-11-86. In the companion matter namely IT/33/88 the workmen are four in number and they are the ex-employees of the Panaji branch of the said Creative Market Consultants, the firm which was being run by one Edwin E. D'Souza a resident of Margao. These four employees were serving in the Panaji branch and their services are stated to have been terminated w.e.f. 15-1-1987 and they too have challenged the order of termination of their services and have claimed reinstatement with other benefits. In both the Government references the common factor is about the termination of the services of the ex-employees of the main branch at Margao and the Panaji branch. As the facts relating to both the concerns are common the two matters on common consent are being heard together and obviously they are being disposed off by a common judgment. The facts of both these cases are of a typical character and nature and they have to be stated in details at this stage.

As noted above we are concerned with the ex-employees of the aforesaid Creative Market Consultant having its head office at Margao and branch office at Panaji. The admitted facts and position are that the said firm the activities of which are understandable by the very name was established by one Edwin D'Souza who was a Commerce graduate but not an advocate as such. So also he was not a qualified Chartered Accountant. All the same the said Edwin D'Souza, hereinafter referred to as Edwin had started this firm which was supposed to cater to the needs of the business and trade was having multifarious activities. The firm was to give legal advice, to work as Income Tax and Sales Tax consultants to arrange for the writing of the books of accounts, to work as Estate Developers and lastly the said Edwin had started an altogether different activity namely the manufacture of electric bulbs. It appears that the said Edwin was quite successful in promoting the activities of this firm of consultancy and he had to engage a large number of employees including typists and consultants. The activities, it appears were initially confined to the Head Office at Margao. However, as and when the business activities increased Edwin spread his field and he opened branches at Panaji with which we are concerned and other two branches at Mapusa and Vasco.

This Edwin who was a confirmed bachelor died on 1st Nov., 1986 probably on account of cerebral-thrombosis. It appears that for a few months he was not keeping good health. He had the nearest relative, his brother by name Gilbert and incidently it is this Gilbert who is contesting these two references on behalf of the firm. During his life time Edwin made a will of all his properties whereunder he had bequeathed all his properties to his brother Gilbert. He also had given a Power of Attorney to deal with his property in the name of his brother Gilbert. So on all counts this Gilbert was the sole benefactor getting all properties belonging to his brother.

After the death of Edwin the brother Gilbert obtained a probate of the will and thereafter started acquiring all properties belonging to his brother. Even though the case is made out to point out that the activities of the firm were solely dependent on the personal achievement and experience of the Prop. Edwin and as such upon the death of Edwin all activities of the main firm and its branches came to a stand still. While countering his claim it is suggested by the workman that even during the life time of Edwin they were running the business of the head office as well as the branch offices and their duty was to look after the interest of the different clients of the firm and also to collect the dues from the clients and deposit the same in the ac-

counts of the firm in the bank and Edwin in turn was looking to the interest of his employees by disbursing the payments from month to month. Anyway all the activities of the four branches were going on without any interruption till the death of Edwin on 1st Nov., 1986 and the dispute started thereafter. The brother Gilbert who got the probate under his will felt that he who was a Proprietor of a hotel was not conversant with the activities of the firm of consultancy and it was beyond his capacity to run the firm. So he took a decision to close down the firm and the branches. As a step towards this he initially closed down the Head office at Margao on 18–11–86 followed by the closure of the Panaji branch on 15–1–87. This move of the new proprietor who had entered into the shoes of Edwin was resented to by all the employees for obvious reasons. The workmen claimed that their services were terminated in most unceremonious manner. According to them the brother Gilbert stepped in the office at Margao on 18–11–86 told all the employees that he was not interested in running the office of the consultancy, that the services of the workmen who were 9 in number stood terminated and that they should go home. This message given to the workmen rather abruptly was a shock to them but they had to walk out of the office without knowing what to do and Gilbert closed the office, locked it and walked away. This similar process was followed in the case of Panaji branch where the employees concerned were 4 in number.

This information is given by the 9 workmen in IT/48/87 in their claim statement dated 15–12–87. According to them, the said Gilbert abruptly terminated their services by issuing termination letters dated 18–11–86. As the services were terminated abruptly without paying their legal dues these workmen raised an industrial dispute before the Asst. Labour Commissioner at Margao where the concilliation proceedings went on and they ended in failure. The A. L. C. filed his failure report with the Government dated 13–3–87 and the Government acting on the report made this reference to this Tribunal u/s 10(1)(d) of the Act. Similar information is given by the 4 workmen of Panaji branch in their statement of claim Exb. 2 dated 15–11–88.

The brother Gilbert who is in effective control of the assets of the firm and its branch at Panaji, had filed written statement in both the matters. The sum and substance of his written statement is that the firm was the sole proprietory establishment of his brother late Edwin D'Souza and he admits that a relationship of workmen and employer existed between the ex–employees and his brother till 31st October, 1986 the day on which he was alive. According to him, the services of the workmen stood terminated automatically on and from 1st November, 1986 on account of the death of the sole Proprietor. He also did have terminated the services of the respective workmen on 18–11–86 and 15–1–1987. He has his own reasons for doing so. According to him the business was a closed Industry/Establishment and as such the present Government reference is not proper and the Tribunal has no jurisdiction. According to him during the illness of his brother and even after the death of the brother the business affairs of the management was managed and looked into by the workmen and what he took into possession was a defunct business. According to him the workmen had mis–managed the affairs of the firm and they were responsible for embezzlement of funds and movable property. He states that the firm was not running business establishment but it was a closed establishment. The workmen have filed rejoinder to the W. S. stating that the brother Gilbert had not only taken possession of the firm and the branch as legal successor of Edwin but he abruptly terminated the services of the employees and thus started running the business through others.

With the above rival contentions, I framed the following issues in IT/48/87 on 11–4–88.

1. Whether the Party II/Employer proves that M/s. Creative Market Consultant was a sole proprietorship firm and it ceased to exist since 31st October, 1986 when its sole proprietor Edwin D'Souza died ?
2. If so, whether the party II further proves that the brother of Edwin D'Souza just took possession of the premises without the possession of the business and the business of M/s. Creative Market Consultant was closed w.e.f. 18th November, 1986 ?
3. Whether the action of the management of M/s. Creative Market Consultant, Margao in terminating the services of 9 workmen w.e.f. 18–11–1986 is just and legal in the circumstances of the case ?
4. Whether the Party I/Workmen prove that the commercial and professional activities of M/s. Creative Market Consultant are still continuing even after the termination of the services of the employees as alleged ?
5. If so, what reliefs are the applicants–workmen entitled to in the circumstances of the case ?

My Findings :

1. Yes.
2. No.
3. No. Termination not just and legal.
4. Not pressed as the claim for reinstatement is not pressed.
5. Compensation and other benefits without reinstatement as per order.

In IT/33/88 I framed the following issues at Exb. 5 on 4–8–89 :

1. Whether the Party II/Employer proves that M/s. Creative Market Consultant was a sole proprietorship firm and it ceased to exist since 31st October, 1986 when its sole proprietor Edwin D'Souza died ?
2. If so, whether the party II further proves that the brother of Edwin D'Souza just took possession of the premises without the possession of the business and the business of M/s. Creative Market Consultant was closed w.e.f. 18th November, 1986 ?

3. Whether the action of the management of M/s. Creative Market Consultant, Margao in terminating the services of 4 workmen w. e. f. 15-1-1987 is just and legal in the circumstances of the case ?

4. Whether the Party I/Workmen proves that the commercial and professional activities of M/s. Creative Market Consultant are still continuing even after the termination of the services of the employees as alleged ?

5. If so, what reliefs are the applicants-workmen entitled to in the circumstances of the case ?

My Findings :

1. Yes.
2. No.
3. No. Termination not just and legal.
4. Not pressed as the claim for reinstatement is not pressed.
5. Compensation and other benefits without reinstatement as per order.

Reasons :

Issues 1 to 5 : In view of the common facts and in view of the admitted position on many of the points, I have taken all these issues together for consideration and I am recording my findings thereon. Initially a main contraver question between the workmen and the brother Gilbert was running of the two offices of Margao and Panaji by the employees during the illness as well as after the death of Edwin by the respective employees. Efforts were made on behalf of Gilbert to point out that the workmen who were in full control of the business had amassed huge amounts for which they had not given proper accounts to the brother Gilbert who became the proprietor under the will. It is aparently clear that during the illness and after the death of Edwin the conditions were rather chaotic and it is just possible that the workmen or the employees on the spot might have exploited the situation to some extent. All the same, all the employees were solely dependent on the good will and good wishes of Edwin who was their Proprietor and who was paying them their salaries at the end of the month even if he had to bring some money from his office at Margao. All things were working well according to the workmen till the death of Edwin and the question of accountability of the ex-workmen would have come to the fore if the question of reinstatement into services was to be considered by me. However, Shri Cuncolienkar for the workmen in both the references have stated before me that the workmen were not pressing their claim for reinstatement into services but they were keen on getting retrenchment compensation and other analogous benefits arising out of the Sec. 25F and 25FFF of the I. D. A. So as the question is squarely confined to the benefits arising out of retrenchment by an order of termination or on account of closure as the case may be. I need not go into the details of the accountability because I am to consider the events after the death of Edwin and after the termination of the services of the workmen in particular. Hence instead of going into the details by studying the statements of the workmen before me, I shall straight away advert to the evidence of Gilbert which is recorded before me on 29-9-89 and thereafter his cross examination was completed on 13-1-90. As the central point of controversy is the closure of the head office and Panaji branch office, I shall study what Gilbert has to say in this regard. In paras 1 to 3 he speaks about the running of the firm by his brother and the fact that his brother died on 1-11-86 leaving all his properties to him under a will. What he states about the actual termination is important and in para. 4 he states that he went to Margao head office on 18-11-86 and the workmen were present in the office. He asked them for the details of the assets in the office and expressed to the workmen that he had no intention to run the business and he would close it down. So on that day, he closed down the business and issued letters of termination to all the workmen who were present in the office and letters of termination were typed in the machine of the office and it is a common ground that termination letters were issued on 18-11-86 and the xerox copies and original letters are on record. About the Panaji branch he states that he went to that branch on 15-1-1987 where four employees were working and similar letters of termination were issued to them and the xerox copies as well as the original letters of termination are on record. This is the sum and substance of his statement in chief examination. In his cross examination he admits about his having taken a probate on the strength of the will made by his brother and the tussle between him and the employees regarding the accounts in the office. About the Margao main branch the same is occupied by Goa Aluminium Company and the stock and furniture of the firm is still in possession of that company. About Panaji branch he admits that he has given the same to one Advocate by name Mr. Singh. He admits that the Panaji office is in a rented premises and it is he who pays the rent to the landlord. He also admits that all the stock and furniture of Creative Market Consultant are still lying in the office of Panaji branch and the Advocate Singh is making use of the same. It is suggested to him that the workmen in the Mapusa branch are running the office on behalf of M/s Creative Market Consultants. The admissions of Gilbert do go to show that he is still in effective management at Margao as well as Panaji branch though they are being run by somebody else on his behalf. Now he is the sole proprietor of the head office and Panaji branch under the will and under law he is entitled to run the office by himself or to run it through others. His right to do so cannot be challenged by anybody. It can be presumed that Gilbert got the advantage of the things and he might have been benefited in the whole matter because all assets of his brother came into his possession and now he is the sole proprietor of the firm and its Panaji branch. The next question however is whether when he came in possession of the assets of the firm whether he is also bound by the liabilities of the firm. Here we are not considering the question of the financial liabilities of the firm with outsiders or the dues of the firm to be recovered from the clients of the firm.

It is altogether a different aspect and that is a matter with which Gilbert is directly concerned. However, the Industrial Tribunal considering the Government reference has to study the position under law and the position under Sec. 2(oo) read with Sec.25F and 25FFF in particular. The position to be studied is the position under law and so far as the factual aspects are concerned on the showing of Gilbert himself he retrenched the workmen of Margao branch on 18-11-86 and the Panaji branch on 15-1-87. Admittedly, no compensation whatsoever was paid to the 9 workmen of Margao head office or the 4 workmen of Panaji branch. No formal notice of one month as required under law was given to any of the workmen nor any retrenchment compensation nor gratuity as required under Sub clause A & B of Sec. 25 was offered or given to the workmen. This position is well admitted.

While offering his submissions on this point Shri Kamat for Gilbert did submit before me that no relationship of employer and employee existed or was created by the will between the workmen and Gilbert. According to him Gilbert was constrained to close down the business because he was not able to run the same. According to him payment of compensation is not compulsory u/s 25FFF of the Act. I do not find any substance in this submission because sub. sec. (1) of Sec. 25FFF clearly states out that "Where any undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for more than a year be entitled to notice and compensation in accordance with the provisions of Sec. 25F of the Act as if the workman has been retrenched". The provision is very clear and straight. Shri Kamat relies on an authority of a Division Bench of Gujarat High Court reported in 1980 LAB I. C. page 85 wherein the judgment is based on a Supreme Court Judgment reported in AIR 1979, S. C. page 170. While analysing the position under sub. Sec. 25F and 25FFF the Gujarat High Court observed that closure of undertaking does not prohibit termination of employment on closure without payment of compensation or wages in lieu of notice and payment not condition precedent. I find that the Division Bench was on the point of reinstatement of an ex-employee upon closure of the undertaking but the position of payment is also discussed in that ruling. The ruling also discusses the position u/s 25FFF and the sub - clause (1) which I have discussed already is reproduced by the High Court holding that the provisions u/s 25F are attracted and the workmen is entitled to compensation as if he has been retrenched u/s 25F of the Act. So what the Gujarat High Court has stated is that the termination of employment on closure of the undertaking without payment of compensation or without either serving notice is not prohibited because such payments are not conditions precedent to the closure. While considering the Supreme Court case in the Straw Board Manufacturing CO's case the Gujarat High Court has observed that "the workmen cannot question motivation of the closure once closure has taken place in fact". So the emphasis is on the right to question the closure but not on the liability to pay the compensation as if it was a retrenchment under Sec. 25F of the Act. So the Gujarat ruling is not of much help to the brother Gilbert who came in possession of the assets of his brother in the Creative Market Consultant under the will. So the question is whether he is liable to pay the compensation when he holds the assets of the firm and there are some authorities of the Supreme Court on this point.

In the case of Hindustan Steel Ltd., reported at page 487 Civil Appeal No. 1580 of 1970 the services of the employees had come to an end by efflux of time and the management contented that they had not retrenched the workmen. While considering this point the Supreme Court held that retrenchment as defined in Sec. 2(oo) of the Act would include termination of services by efflux of time in terms of an agreement between the parties. In that case full back wages were awarded by the Labour Court and the award of full back wages was upheld by the Supreme Court. In another case reported in 1976 Vol. (32) FLR page 197 the Supreme Court was considering the position of retrenchment and the Supreme Court observed that termination embraces not merely the act of termination by the employer but the fact of termination however produced, may be, the present may be a hard case but the question is whether the employer had tried suitable verbal devices circumventing the armour of Sec. 25F of the Act and 2 (oo) of the Act. While dis-allowing the appeal the Supreme Court upheld the order of the two courts awarding retrenchment compensation and other benefits. In an earlier case of Hathising reported in 1960, LLJ page 1, the Supreme Court has observed that closure of an undertaking involves termination of employment of many employees and throws them into the ranks of unemployed. It is with the object of redressing the misery resulting from the unemployment and in the interest of general public that the legislature has made provision for payment of compensation etc., to the workmen discharged from service at the time of closure of an establishment, by this provision, meaning Sec. 25FFF of the Act. In subsequent ruling of Indian Hume Pipe Co. Ltd., reported in 1959 II LLJ page 80 the Supreme Court has observed that the loss of service due to closure stands on the same footing as loss of service due to retrenchment for, in both cases the employee is thrown out of employment suddenly for no fault of his and the hardships which he has to face are, whether unemployment is result of retrenchment or closure of business, the same.

Considering the ratio of the observations of the Supreme Court and the admission of Gilbert in his evidence it is apparently clear that Gilbert had taken a decision rather abruptly to close down Margao Head Office on 18-11-86 and Panaji branch office on 15-1-87 and on these dates the employees of both, Margao head office and Panaji branch were thrown on the street and the termination was done without following proper procedure. The employer who entered the shoes of his brother Edwin has to feel himself lucky that the claim for reinstatement is not pressed by the workmen but they have restricted their claim for payment of come pensation etc., arising out of the closure U/S 25F and 2(oo) of the Act and all legal dues arising out of the

retrenchment on account of closure will have to be paid to the workmen and the termination simplicitor is not just and proper and the workmen will be entitled to all reliefs accepting the relief of reinstatement. I have already answered the above issues accordingly and I answer the Government reference as below :

ORDER

Ref. No. IT/48/87

The action of the management of M/s. Creative Market Consultants, Margao in terminating the services of the 9 workmen w.e.f. 18–11–86 is neither legal nor justified. The workmen S/Shri R. B. Kakodkar, V. R. Raikar, Alexander Alvares, Madan Poi Kakode, Rosario Albuquerque, Miss Diana Alphonso, Miss Flory D'Souza, Miss Loreine Fernandes and Shri Onofre G. Pereira are therefore entitled to retrenchment compensation with full back wages till 18–11–86 and other benefits arising out of the order of closure resulting in their retrenchment. The relief of reinstatement into services is not granted to the workmen in the circumstances of the case.

There shall be no order as to costs. Inform the Government accordingly about the passing of the award.

ORDER

Ref. No. IT/33/88

The action of the management of M/s. Creative Market Consultants, Panaji in terminating the services of the four workmen w.e.f. 15–1–1987 is neither legal nor justified. The Workmen S/Shri Prabodh P. Patyekar, Frederick Mascarenhas, Miss Perpetua Rodrigues and Miss Anjali Archarya are therefore entitled to retrenchment compensation with full back wages till 15–1–1987 and other benefits arising out of the order of closure resulting in their retrenchment. The relief of reinstatement into services is not granted to the workmen in the circumstances of the case.

There shall be no order as to costs. Inform the Government accordingly about the passing of the award.

S. V. Nevagi
Presiding Officer
Industrial Tribunal

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